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No. _____

IN THE SUPREME COURT

Of The

United States

October Term, 1984

HUMBERTO CALERO and LUIS BOTERO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Ninth Ciuruit

STEPHEN J. HEISER, ESQ.
LAW OFFICES OF STEPHEN J. HEISER
One Market Plaza
Spear Street Tower, 19th Floor
San Francisco, California 94105
Telephone: (415) 495-0111
Attorneys for Petitioners

36pp

QUESTION PRESENTED

Whether the "collective knowledge exception" to the requirement that arresting officers have personal knowledge of facts constituting probable cause may be invoked without proof that the officers were in communication with members of a coordinated investigation.

PARTIES TO THE PROCEEDINGS BELOW

Ten other defendants plead guilty to the charge in the district court and did not participate in the proceedings in the court of appeals.

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The petitioners, LUIS BOTERO and HUMBERTO CALERO, respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on April 12, 1984 (Petition

for Rehearing denied on August 7, 1984.)

OPINIONS BELOW

The District Court issued no opinion nor oral findings of fact nor conclusions of law in denying defendants' motion to suppress evidence. The opinion of the Court of Appeals, which is unreported, appears as Appendix A. The Order of the Court of Appeals dated August 7, 1984, denying petition for rehearing, appears as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on April 12, 1984; and petitioners' timely petition for rehearing was denied on August 7, 1984. An Order Staying the Mandate of the Court of Appeal for the Ninth Circuit pending the petitioners' certiorari petition was issued on September 6, 1984, but in two subsequent Orders, the court stayed its judgment until October 19, 1984, because of counsel's medical emergency. Jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...."

STATEMENT

1. Shortly after 4:00 a.m. on January 17, 1983, federal customs and law enforcement agents participating in a year-long investigation into cocaine smuggling observed seven individuals in frogman gear carrying duffle bags through a field adjacent to a remote area near Pier 96 of the San Francisco Wharf. Suspecting that the individuals had transported cocaine from the Grand Columbiana Lines vessel Ciudad de Cucuta, the agents in charge (FBI Special Agent Alba and Supervisory Customs Patrol Officer Callahan) gave a radio telephonic order that "all units under my command [should] move in."

Petitioners CALERO and BOTERO were

arrested by unidentified agents some ten minutes later on one of the streets leading to the area where the ship was moored and the frogmen and cocaine were seized. All evidence adduced at the court trial which resulted in their convictions for importing cocaine and possessing cocaine for distribution was gained by virtue of the warrantless arrest and the seizures of items of evidence from them and from the car they were driving.[1/]

2. In response to petitioners' Motion to Suppress, the United States tendered affidavits by Agents Alba and Callahan which summarized the observations of the many agents participating

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[1/] Petitioners and 10 others were charged in a four-count Indictment with conspiring to smuggle cocaine and conspiring to possess that cocaine for distribution, in addition to the two substantive offenses described above. All the other defendants plead guilty to one or more counts of the Indictment. CALERO and BOTERO were each sentenced to five years imprisonment (plus a special parole term of three years), with credit for time already served, on each of two counts (the sentences to run concurrently). The conspiracy charges were dismissed.

in a "joint coordinated effort" to identify the members of a suspected smuggling group consisting almost exclusively of Columbian nationals in San Francisco and Los Angeles. There was and is no dispute that the facts as summarized in the affidavits and accompanying "surveillance logs" established probable cause that the occupants of a red Ford Fairmont participated in the scheme by surveilling the surrounding area both before and during the actual smuggling, and also by ferrying the frogmen from an apartment to the wharf area. The only question below, and the sole question here, is whether the government sufficiently justified the stop and arrest of the Fairmont and Calero and Botero.

The facts bearing on this question are scant and beyond dispute. The officers who made the stop, arrest, and search were never identified. No proof was ever made that they were members of the joint investigative team which cracked the smuggling group, nor even that they were in communication with Alba or Callahan or anyone else in

the team. The evidence showed only that after Callahan learned that the frogmen moving through the field had "spotted" surveilling officers, he gave a general order to "all units" to "move in." Some ten minutes later, and miles away, Calero and Botero were arrested.

REASON FOR GRANTING THE WRIT

1. The Ruling By the Court of Appeals that Communication May be Inferred Between Arresting Officers Lacking Probable Cause, and Supervisory Officers With Such Knowledge, Requires This Court to Settle a Conflict Between Circuits and Settle a Crucial and Undecided Question of Constitutional Law.

The underlying question presented here is whether any limits exist to the so-called "collective knowledge" exception to the general rule that:

> "[T]he facts and circumstances within [the officers'] knowledge, and of which they had reasonable truthworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."
>
> Carroll v. United States, 267 U.S. 132 (1921)

In this age of high technology, the personal knowledge requirement has been considerably relaxed, and rightly so, for if not:

> "[T]he whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first-hand knowledge of facts concerning a crime or alleged crime."
>
> Williams v. United States, 142 U.S.F.D.C. 371, 372, 308 F.2d 326, 327 (1962)

Analysis of the prior decisions of the Ninth Circuit, and of every other federal court of appeals as well, yield a more or less standard description of when personal knowledge may be dispensed with:

> "An individual in a coordinated investigation need not have personal knowledge of all the relevant facts to affect an arrest. It is sufficient if the pool of objective data possessed by a group of agents acting in concert supplies the requisite probable cause."
>
> United States v. Bernard, 623 F.2d 551, 560-61 (9th Cir., 1979)

2. Petitioners do not quarrel with this rule so long as the very premise behind it is honored:

That is, where the government intends to invoke the "collective knowledge exception," it must show that the arresting officers were part of the investigative team and also that they actually received any communication which purports to impart crucial facts or to order particular action. See, for example, United States v. Hawkins, 595 F.2d 751 (C.A.D.C., 1978); United States v. Hilton, 469 F.Supp. 94 (D.C.Me. 1977), aff'd, 619 F.2d 127 (1st Cir., 1980); United States v. Canieso, 470 F.2d 1224 (2nd Cir. 1972); United States v. Bianco, 189 F.2d 716 (3rd Cir. 1951); Moreno-Vallejo v. United States, 414 F.2d 901 (5th Cir. 1969); United States v. Woods, 544 F.2d 242 (6th Cir. 1976); United States v. Regan, 525 F.2d 1151 (8th Cir. 1975); United States v. Bernard, supra; United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980); United States v. Agostino, 608 F.2d 1035 (11th Cir. 1979).

As the Court of Appeals for the Sixth Circuit noted in Woods, supra:

> "[W]hen a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest. But here in contrast, because there was no evidence that '[Garibotto's] order to arrest [Jones or Hert] was the basis of their arrest, his knowledge cannot be considered in determining probable cause.'"

3. In the instant case the court of appeals sanctioned the total absence of any proof that the officers who made the arrest were part of a joint investigative team, or that they had received or acted upon the Callahan order to "move in." Since the facts establishing probable cause to stop Calero's automobile were obtained by different agents in geographically separate locations only in the few minutes preceding the arrest, that arrest can be justified only if there was close communication among team members. In the abject and deafening silence of the record on this point, the court of appeals chose to "infer" that the anonymous arresting officers were members of the co-

ordinated investigation, simply because the arrests were more or less "contemporaneous." Appendix A, infra, 4. But so are mass arrests, arrests merely on suspicion and arrests of those who, like these petitioners, belong to the same ethnic or racial group as others as to whom the evidence may be clear that a crime had been committed.

CONCLUSION

Never before has any federal court permitted an arrest without any proof whatsoever that the arresting officers personally possessed probable cause, or in the alternative, actually communicated with those who did. Certainly, it is possible that such communication in fact took place, but in the absence of proof, it is possible only. Until and unless this Court so amends the Fourth Amendment to read that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon possible cause...",

these convictions should be reversed.

Respectfully submitted,

STEPHEN J. HEISER, ESQ.
LAW OFFICES OF STEPHEN HEISER
One Market Plaza, 19th Floor
Spear Street Tower
San Francisco, California
Telephone: (415) 495-0111

Attorney for Petitioners

CERTIFICATE OF FILING AND SERVICE

Stephen J. Heiser, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within:

PETITION FOR A WRIT OF CERTIORARI
To The Untied States Court Of Appeals
For the Ninth Circuit

on October 15, 1984. Service was made upon counsel for Respondent at the following addresses:

REX E. LEE
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

JAMES LASSART
R. CHRISTOPHER LOCKE
Assistant United States Attorneys
450 Golden Gate Avenue, 16th Floor
San Francisco, CA 94102

All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 1984, at San Francisco, California.

STEPHEN J. HEISER

APPENDIX A

United States Court of Appeals

For the Ninth Circuit

United States of America,	)	NO. 83-1177
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-83-0073-WHO
v.	)	
	)	
Luis Arnoldo Botero and Humberto Calero,	)	MEMORANDUM*
	)	
Defendants-Appellants.	)	
	)	

On Appeal From the United States District Court

For The Northern District of California

William H. Orrick, District Judge, Presiding

Argued and Submitted April 12, 1984

Before: Judge Wisdom, ** Skopil and Norris,

Circuit Judges:

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*/ Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

**/ The Hon. John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appellants were convicted of importing cocaine and of possessing cocaine with intent to distribute in violation of 21 U.S.C. Sections 952(a) and 841(a) (1). On appeal, they contend that their warrantless arrest was not supported by probable cause. The district court properly rejected that argument. We affirm.

The test for probable cause is whether at the time of arrest the arresting officers had within their knowledge "reasonably trustworthy information ... sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense". Beck v. Ohio, 379 U.S. 89, 91 (1964).

> In applying that test, we consider all the facts known to the officers and consider all of the reasonable inferences that could be drawn by them before the arrest. United States v. Martin, 509 .F2d 1211, 1213 (9th Cir.), cert. denied, 421 U.S. 967 (1975).

Appellants argue that the arresting officers did not have sufficient personal knowledge to support a finding of probable cause. But, an individual officer in a coordinated investigation need not have personal knowledge of all the relevant facts to justify a warrantless arrest. United States v. Lomas, 706 F.2d 886, 892 (9th Cir. 1983). "It is firmly established that one officer may rely on information provided by another officer to establish ... probable cause." United States v. Burnette, 698 F.2d 1038, 1047 n.17 (9th cir.), cert. denied, 103 S.Ct. 2106 (1983). Further, it is not necessary that the collective pool of information be communicated to the arresting officers. United States v. Bernard, 623 F.2d 551, 560 (9th Cir. 1979).

The district court correctly found that there was sufficient knowledge collectively possessed by the agents to support probable cause for arrest. While mere presence in an area in which a crime is being committed is insufficient to implicate a

person in criminal activity, Lomas, 706 F.2d at 892, there was here a "succession of superficially innocent events [that] had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one." Bernard, 623 F.2d at 560, quoting United States v. Patterson, 492 F.2d 995, 997 (9th Cir.), cert. denied, 419 U.S. 846 (1974).

Appellants complain that the agents' declarations never identified the arresting officers. The fact that the names of the arresting officers were not supplied is immaterial in light of the agent's declaration that all officers were briefed and that all units were ordered to move in for arrests. Furthermore, appellant's arrests were contemporaneous with the arrest order, further adding support for the inference that the arresting officers were members of the coordinated investigation.

AFFIRMED.

APPENDIX B

United States Court of Appeals

For the Ninth Circuit

United States of America,	)	NO. 83-1177
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-83-0073-WHO
v.	)	
	)	
Luis Arnoldo Botero and Humberto Calero,	)	ORDER
	)	
	)	
Defendants-Appellants.	)	
	)	

On Appeal From the United States District Court

For The Northern District of California

William H. Orrick, District Judge, Presiding

Argued and Submitted April 12, 1984

Before: Judge Wisdom,* Skopil and Norris,

Circuit Judges:

panel has voted to deny the petition for rehearing. The Petition for rehearing is denied.

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*/ The Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.